The Tax Court's failure to timely appoint a replacement TMP, with the incumbent fiduciary status and duties, resulted in a default decision which inflicted a totally bogus "whipsaw" liability on the partners for tax year 1988 – which even the Tax Court acknowledged was "patently unreasonable, unfair, unjust and inequitable" – and violated their due process rights by improperly taking their statutory right to a TMP.

Petitioner Reigler seeks relief for himself and the other "nonparticipating" partners who were denied their constitutional and statutory rights to effective notice and representation in the partnership-level Tax Court case.

STATEMENT OF THE CASE

Garlon Riegler was a limited partner in Cinema '84, a limited partnership formed to purchase and exploit the rights to the first-run films "The Terminator" starring Arnold Schwarzenegger, "The Howling," "Return of the Living Dead," "Perfect Strangers," "A Breed Apart" and "Special Effects."

Cinema '84 was one of numerous film-related partnerships promoted and managed by Richard and Frederick Greenberg. The Greenberg Brothers were the only general partners in Cinema '84 and Richard Greenberg was designated as the partnership's TMP.

Cinema '84 was subject to the bifurcated provisions of TEFRA which require that for tax purposes all "partnership items" be resolved at the partnership level before any partner-specific issues can be addressed or any related assessments made against the partners.

Under TEFRA, if the IRS disagrees with a partnership's tax return and wants to adjust any of the "partnership items" it must first issue a Notice of Final Partnership

Administrative Adjustment (FPAA) for that year.[5]

In late 1991, the IRS audited Cinema '84 and issued FPAAs proposing adjustments to partnership items for tax years 1984-1989. Richard Greenberg, as TMP, filed a partnership-level petition in the Tax Court under 26 U.S.C. §6226 to dispute the IRS's proposed adjustments.

In January of 1994, the Greenberg Brothers were placed in involuntary bankruptcy. By statute, Richard Greenberg ceased to be TMP when the bankruptcy petition was filed.[6] Partners may appoint a replacement TMP, but only from among the remaining general partners.[7] Here there were no general partners eligible because Frederick Greenberg, the only other general partner, was also disqualified by the bankruptcy filing. If the partners fail to appoint a replacement TMP then the "automatic designation" rule kicks in, but it also applies only to general partners.[8] Normally, the IRS is then required by statute to designate a replacement TMP.[9] But where, as here, litigation has already begun the Tax Court has stripped the IRS of that duty and authority because, it has held, it is inappropriate for the IRS to appoint the representative for its opposing party.[10] Once suit is filed the Tax Court took

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5 §6223(a).

6 §6231(c)(2); Treas. Reg. §301.6231(c)-7 T(a).

7 §6231(a)(7).

8 §6231(a)(7).

9 §6231(a)(7). The IRS may designate any eligible partner, it is not restricted to choosing from only the remaining general partners.

10 *Computer Programs Lambda Ltd. v. Commissioner*, 90 T.C. 1124, 1127 (1988) ("*Lambda II*").

for itself the sole authority to appoint a replacement TMP from among the limited partners.[11]

In 1994, 1995 and 1999, the Tax Court held hearings seeking a volunteer to act as the new TMP. Prior to each hearing the Tax Court issued an order stating in the style of the case that Richard Greenberg was still the TMP, but acknowledging in its text that Cinema '84 did not have a TMP. In a TEFRA partnership-level case there is no requirement or procedure to identify all parties to the proceeding. The orders were purportedly mailed by the court to "all partners in the partnership to the extent they have been identified to the Court." Each order instructed the partners that if no partner appeared at the hearing, and the case was not disposed of by settlement, then the case would be dismissed and a decision entered "in accordance with the amount determined by respondent."

Attached to the orders for the 1994 and 1995 hearings was a "Notice to Partners" stating that any partner who did not appear at the hearing would be deemed to have waived his right to a TMP. The Tax Court then stated, incongruously, that "[TMPs] are reminded of their obligations under §6223(g)," and instructed the partners to seek legal advice regarding a possible settlement from the IRS, the opposing party in the case. Finally, the Tax Court stated that any "indirect" partners[12] who, it acknowledged, were *not* being sent the orders and notices would, nonetheless, be subject to any "substantial tax liabilities" arising from the case. [App. 37, 42]

The Tax Court served the orders on Richard Greenberg as if he were still TMP and additional copies were purportedly sent to those partners, including Reigler, listed

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11 *Id.*

12 §6231(a)(10).

by the Court. [App. 27-36, 44-53] Other than the Tax Court's purported mailing list there is no evidence in the record that the orders were mailed to Reigler or the other nonparticipating partners. In fact, the evidence in the record proves that the Tax Court knew that many partners were *not* receiving the notices. At both the 1994 and 1995 hearings the Tax Court stated that numerous notices had been returned to the Court undelivered due to either bad addresses of for unknown reasons.[13]

Because he was listed by the Tax Court, Reigler has never disputed that the Tax Court *sent* him the notices even though there is no evidence to support this claim. However, he does not recall receiving them and his records do not reflect that he ever received them. There is no evidence in the record that Reigler ever *received* the notices purportedly mailed by the Tax Court. Even the Second Circuit does not allege that Reigler actually *received* the notices.

Representatives for numerous partners attended each of the hearings but no partner volunteered to act as TMP. Reigler did not attend the hearings. The Tax Court never appointed a replacement TMP.

In July, 1995, the IRS filed a motion to dismiss for failure to prosecute and served it on Richard Greenberg as if he were still TMP.

From 1995 to 1999, many partners filed motions and litigated issues specific to themselves. No partnership-level litigation over the merits of the FPAAs was undertaken and all pleadings stated in their style that Richard Greenberg was still the TMP and were required by the Tax Court to be served on Greenberg as if he were still the TMP.

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[13] See the transcripts of the consolidated hearings held in New York, New York, on Wednesday, September 21, 1994 at pages 12-14 and on Wednesday, February 8, 1995 at pages 3-4, 40.

In 2000 an Order of Dismissal and Decision was entered sustaining the IRS's adjustments in the FPAAs. The decision stated in its style that Richard Greenberg was still the TMP, and was served on him as if he were still the TMP. [App. 58]

Other limited partners appealed to the Second Circuit regarding multiple, partner-specific issues that culminated in the opinion, unrelated to this petition, at *Cinema '84, Richard M. Greenberg, Tax Matters Partner v. Commissioner*, 294 F.3d 432 (2nd Cir. 2002).

While that appeal was pending, the IRS notified Riegler for the first time of the proposed adjustments as to him resulting from the Tax Court decision. The notice stated that "[a] detailed report which sets forth the adjustments to the partnership items has been furnished to the [TMP]. Please contact such individual or organization for additional information." The IRS knew this was a false statement since there was no TMP. The IRS then assessed against Riegler tax liabilities for each of the tax years 1984-1989, including $13,317.00 (tax) and $26,702.12 (interest) for 1988.

It is undisputed that the 1988 tax assessment is completely bogus without any basis in fact. [14] On information and belief, similar proportionate amounts were

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[14] The possibility for the abusive whipsaw liability could not have been foreseen by the nonparticipating partners. The written determinations in the 1988 FPAA were inconsistent with the language on the Form 870-P Schedule of Adjustments. But this was a latent ambiguity which could only be foreseen by comparing the schedule of adjustments with the partnership's 1988 Form 1065. But the partners were never provided with copies of the partnership Forms 1065. Had Reigler's 1988 tax liability been based on the IRS determinations as stated in the FPAA, as purported by the Tax Court, he would have owed nothing for 1988.

also assessed against the other unsettled Cinema '84 partners based on this purely phantom liability.

The appeal by other partners concluded in 2002. On remand the Tax Court dismissed another partner for lack of jurisdiction on March 24, 2003.

On December 9, 2003, having determined that the 1988 liability was completely bogus, Reigler filed a motion for leave to participate out of time to dispute the bogus liability. He also lodged a notice of election to participate, a motion to be appointed TMP, and a motion to vacate the September 1, 2000 decision on the ground, among others, that the Tax Court's failure to appoint a replacement TMP was an improper taking of his statutory right to a TMP in violation of his due process rights.

In its opinion at *Cinema '84, Richard M. Greenberg, Tax Matters Partner v. Commissioner*, 122 T.C. 264 (2004) the Tax Court determined that Reigler's December 9, 2003 motion was timely. [App. 20] The Tax Court agreed, *arguendo*, that the 1988 whipsaw was "patently unreasonable, unfair, unjust and inequitable," but, nonetheless, denied Reigler's motion because "none of [his] allegations, standing alone or together, constitute a ... valid reason for vacating a final decision of this Court." [App. 22] The Tax Court failed to address Riegler's due process argument.

The Tax Court's opinion stated in its style that Richard Greenberg was still the TMP and was served on Richard Greenberg as if he were still the TMP. [App. 58]

Reigler filed a motion for reconsideration which the Tax Court denied without comment. He then timely appealed to the Second Circuit on behalf of himself and the other nonparticipating partners, including those partners not identified by the Tax Court.

In its June 22, 2005, opinion the Second Circuit did not

reach the issue of whether such a due process violation is sufficient basis to vacate a Tax Court decision; instead it held that Reigler's due process rights were not violated because the Tax Court was under no duty *as to him* to appoint a replacement TMP. The Second Circuit held that by not volunteering to be TMP Reigler forfeited his statutory right to a TMP. The court effectively held, though it did not expressly state, that Reigler and his partners had a *duty* to volunteer. But even the Second Circuit would not assert that Reigler or is partners ever *received* the orders that would have put them on notice of this supposed duty.

The Second Circuit did acknowledge that "if one of the unidentified partners was before us, they might have a colorable due process claim." The Second Circuit failed to recognize that in a TEFRA partnership-level case (similar to a class action) where the order appealed from affects all partners, all partners, including those not identified by the Tax Court, *are* before the appellate court.

Reigler, on behalf of himself and all of his affected partner, including the unidentified partners, timely files this petition for writ of *certiorari*.

REASONS TO GRANT THE PETITION

This Court's review is warranted because the Second Circuit's holding contradicts Congress's plain statutory language mandating the appointment of a TMP and because this is an issue of first impression of fundamental importance to every limited partner in every TEFRA partnership-level Tax Court case.

1. History and Purpose of TEFRA

These issues before the court must be addressed within the context of TEFRA's statutory scheme.

a. TEFRA's Statutory Scheme

Partnerships generally do not pay tax, they file information returns.[15] Each partner's share of partnership income, etc., is recognized on their individual return.[16]

TEFRA bifurcated the procedures for determining each partner's tax liability arising from a partnership audit. Common, statutorily defined "partnership items" are first resolved in a single, centralized partnership-level proceeding.[17] Only then can each partner's related *non*partnership items be addressed and a tax assessment made against him.

If the IRS disagrees with a partnership return it must issue a FPAA.[18] If the partners dispute these adjustments they, usually through their TMP, may file a partnership-level petition for *re*determination in the Tax Court. There the Tax Court's jurisdiction is restricted to "partnership items" and their allocation among the partners.[19]

Each partner is a party to and may participate in the partnership-level case only as long as he has an ongoing

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[15] §§701 and 6031; Treas. Reg. §§1.701-1 and 1.6031-1.

[16] §§701, 702; Treas. Reg. §1.702-1(a).

[17] §§6211(c), 6216(4), 6221, 6223, 6225(a), 6230(a)(1), and 6226; Temp. Treas. Reg. §301.6221-1T(a); *Callaway v. Commissioner*, 231 F.3d 106, 110 (2nd Cir. 2000).

[18] §§6223(a) and (d)(2); §6231(a)(7).

[19] §§6226(a) and (f).

interest, *i.e.* only if his partnership items have not been converted to nonpartnership items.[20] The most common causes of conversion are settlements and the filing of a bankruptcy petition, either voluntary or involuntary.[21] Settled and bankrupt partners may no longer participate in, nor be bound as a party to, any partnership-level case.[22]

b. Critical Importance of a TMP

Under TEFRA, the TMP is the liaison between the IRS, the partnership, the partners, and the Court and serves a critical role at both the administrative and judicial levels. Under TEFRA the TMP is the central figure in the partnership proceedings and acts as a fiduciary to the partners.[23] TEFRA's statutory audit and litigation procedures are based on the continual presence of a TMP and cannot operate without a valid TMP.[24]

The rights and duties of a TMP once a partnership-level suit is filed are particularly critical because he essentially bears all responsibility for conducting the litigation on behalf of the partners and keeping them informed of critical developments.

But a partner is not required to rely on the TMP for representation. A partner may elect to become a "participating partner." All pleadings must be served on all

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20 §§6226(c) and (d).

21 §6231(b)(1)(C) and §6231(c)(2).

22 §§6226(d) and 6228(a)(4)(B); Tax Ct. Rules 245(b) and 247(a).

23 *Transpac Drilling Venture 1982-12 v. Commissioner*, 147 F.3d 221, 225, n.6 (2nd Cr. 1998), *citing Computer Programs Lambda, Ltd. v. Commissioner*, 89 T.C. 198, 205-06 (1987) ("*Lambda I*").

24 *Id.*, at n.6.

participating partners and each participating partner may attempt to litigate the partnership-level case as he sees fit.[25] The due process rights of each participating partner are protected because he receives actual notice of the proceedings and represents himself before the court. Partners who do not choose to participate are called "nonparticipating partners" and are equally bound by the outcome of the partnership-level case. The due process rights of the nonparticipating partners are protected because they receive constructive notice of the proceedings through their fiduciary, the TMP, and because the TMP represents their interests before the court. [26] TEFRA is generally structured on the assumption that most, if not all, partners will remain nonparticipating partners.

The TMP is a party to the case and is required to perform his duties, whether or not he filed the petition or elects to be a participating partner himself. [27] The TMP must notify all partners if a partnership-level petition is filed and keep them fully informed of proceedings before the court.[28] The Tax Court and the parties must serve copies of

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[25] While this system holds the potential for chaos, as a practical matter that rarely if ever happens. Most partners choose to become participating partners either to ensure that they receive actual notice of all pleadings or to litigate issues specific to them, *e.g.*, a motion to dismiss as to them based on a prior settlement or bankruptcy.

[26] *Transpac Drilling Venture 1982-12*, at 225.

[27] Under Tax Court Rule 247(a) the Tax Court may sanction a TMP who fails in his duties even where he did not file the petition, settled his partnership items, and is no longer an individual party to the case.

[28] §6223(g); Regs. §301.6223(g)-1; §301.6223(g)-1T for partnership tax years beginning before Oct. 4, 2001; Tax Court Rule 241(f).

all pleadings on the TMP.[29] The IRS must inform the TMP of the partnership item settlement of any partner and the TMP must promptly notify all partners so they may, if they choose, timely request consistent settlement.[30]

c. Replacing a Terminated TMP

The TMP must be a partner.[31] A TMP's designation terminates if his partnership items are converted to nonpartnership items, *e.g.* a bankruptcy petition, voluntary or involuntary, is filed as to him.[32] Once the TMP's designation is terminated, he is not authorized to act as TMP.[33]

TEFRA mandates that a replacement TMP must be chosen or appointed any time the designation of the original TMP has terminated.[34] Depending on the circumstances, the TMP may be designated by the partners via the partnership, the automatic designation rule, the IRS, or, the Tax Court.

The partners, through the partnership, may designate

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[29] Tax Court Rule 246(b), (c).

[30] §6224(c) and Tax Court Rule 248(c). Additionally, by agreed decision the TMP may settle the case on behalf of all partners with partnership items remaining. *Brookes v. Commissioner*, 108 T.C. 1, 3 (1997).

[31] §6231(a)(2); *1983 Western Reserve Oil & Gas Co. v. Commissioner*, 95 T.C. 51, 62 (1990).

[32] *Barbados #7 Ltd. v. Commissioner* , 92 T.C. 804, 809-810 (1989); §§301.6231(a)(7)-1T(1)(4) and 301.6231(c)-7T, Temporary Proced. & Admin. Regs., 52 Fed. Reg. 6792-6793 (Mar. 5, 1987); *Lambda I* at 206.

[33] *Monetary II Ltd. Partnership v. Commissioner*, T.C. Memo. 1992-562, *citing Barbados #7*.

[34] §6231(a)(7), flush language; Regs. §301.6231(a)(7)-1(m) thru (1)(q).

a TMP but only from among the general partners.[35] The partners *cannot* designate a limited partner as TMP.[36]

If the partnership fails to or cannot designate a replacement TMP, then §6231(a)(7)(B), the "automatic designation" statute, takes effect and the TMP is the general partner with the largest profits interest,[37] or, as among general partners with equal largest profits interests, the general partner whose name is first alphabetically.[38] Automatic designation cannot apply to limited partners and there is no requirement that the automatically designated general partner consent to the designation. The possibility that he may be designated as TMP is simply one of the responsibilities a general partner assumes by joining the partnership.

If the partnership fails to or cannot designate a replacement TMP and the IRS determines that the automatic designation rule is impractical then §6231(a)(7) mandates that the IRS designate a replacement TMP from among the general or the limited partners.[39]

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[35] §6231(a)(7); Regs. §§301.6231(a)(7)-1(a) and (1)(b).

[36] *Transpac Drilling Venture 1983-63 v. United States* , 16 F.3d 383 (Fed. Cir. 1994) (limited partner cannot become general partner for the sole purpose of being the TMP, since the TMP must meet the statutory requirements of general partner status; namely, the TMP must take on general liability); *see also 1983 Western* at 61-62; *Chomp Assoc. v. Commissioner*, 91 T.C. 1069, 1078 (1988).

[37] Regs. §301.6231(a)(7)-1(m)(2).

[38] §6231(a)(7)(B); *Amesbury Apartments, Ltd. v. Commissioner*, 95 T.C. 227, 232-233 (1990); *1983 Western* at 62.

[39] §6231(a)(7) (flush language); *Lambda I*, 89 T.C. at 205-206; Only the IRS can determine that §6231(a)(7)(B) is impractical to apply. *Monetary II Ltd. Partnership v. Commissioner*, 47 F.3d 342 (9th Cir. 1995).

Notwithstanding §6231(a)(7), the Tax Court prohibits the IRS from designating a replacement TMP while a partnership-level case is pending before the Tax Court because it would be improper for the IRS to appoint the representative for its adversary.[40]

In *Lambda II* the Tax Court held that (i) the orderly administration of the partnership-level case requires the existence of a TMP, (ii) the TMP's importance to the functioning of the case invokes the court's inherent power to designate a TMP, and (iii) if there are no eligible general partners, then the Tax Court may designate a limited partner as TMP for the limited purpose of conducting the case.[41] The court must first give the partnership an opportunity to designate a replacement TMP. If the partnership does not designate a TMP, then the Tax Court will designate a replacement.

Where a TMP's designation terminates during a partnership-level case and there is no eligible general partner remaining for the partnership to designate, the Tax Court has invalidated TEFRA's mandate that the IRS appoint a TMP from among the remaining, *i.e.*, limited, partners and has assumed for itself the sole authority to designate a new TMP.

d. Under TEFRA All Remaining Partners Were Before the Appeals Court, Not Just Reigler

Reigler filed the appeal giving rise to this petition in

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[40] *AMRB Associates v. Commissioner*, T.C.Memo 1991-450 ("If the partnership is without a TMP before this Court, we may exercise our authority under Rule 250 to appoint a TMP rather than allow respondent to make a selection, because respondent is the partnersip's adversary during the litigation."), *citing Lambda II* at 1127.

[41] *Lambda II* at 1126-1127.

order to protect both his due process rights and the due process rights of the other nonparticipating partners. The Second Circuit disregarded the other nonparticipating partners, identified and unidentified, and held that the Tax Court had not violated Reigler's due process rights but "if one of the unidentified [nonparticipating] partners was before us, they might have a colorable due process claim."

But the other nonparticipating partners, identified and unidentified, *were* before the Second Circuit. A TEFRA partnership-level case may be appealed by any partner. Normally, an issue affecting the partners in general is appealed by the TMP. But here there *is no TMP.*

Under TEFRA a partnership-level case is not a class action *per se*. But the two proceedings bear many procedural similarities and the TMP has been aptly characterized as the statutory analogue of a class representative.[42] Just as class members secure their due process safeguards through the class representative, "the limited partners secure their due process protection as a result of the fact that the TMP stands in a fiduciary relationship toward them."[43]

The TEFRA procedural scheme makes clear that in an appeal of a TEFRA partnership-level case all partners are before the appellate court, either actually or constructively, to the extent that they are affected by the issue to be reviewed.[44] This is an issue of first impression which the

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[42] *Transpac Drilling Venture 1982-12*, at 225.

[43] *Id.*

[44] For example, the first *Cinema '84* appeal was brought by certain participating partners to address collateral orders specific to them. See *Cinema '84, Richard M. Greenberg, Tax Matters Partner v. Commissioner*, 294 F.3d 432 (2nd Cir. 2002). Technically, all partners were before the appellate court in that appeal. But as a practical matter

Second Circuit gave no analysis whatsoever before holding that the outcome of this appeal – an appeal of an issue that affects all nonparticipating partners and where there is no TMP to appeal on their behalf – applied only to Reigler.

1. The Tax Court's Failure to Appoint a Replacement TMP Violated the Due Process Rights of All Partners

a. The Tax Court's Internal Procedures Are Subject to Due Process Review

In *Ballard*,[45] the Supreme Court recently reiterated that the Tax Court's internal procedures are subject to review for violations of a taxpayer's rights to constitutional due process and that the Tax Court may not create novel internal procedures to circumvent its own published rules without express statutory authorization.[46]

b. All Partners Have a Statutory Right to a TMP

In the TEFRA statutes Congress created the position of TMP both for the convenience of the IRS[47] and to protect the

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it affected only the named participating partners because the collateral orders appealed from applied only to them. It is indisputable that if they had appealed from the merits of the Tax Court's decision and if that decision had been overturned, it would have been overturned, as to *all* partners, not just the named participating partners who filed the appeal. This is especially true where there was no TMP who could have appealed on behalf of the other partners and is reinforced by the fact that the Tax Court case could not become final *as to any partner* until that appeal concluded. §6230(g).

45 *Ballard v. Commissioner*, 125 S.Ct. 1270 (2005).

46 Ballard at 1275, 1282-3, 1285-6.

47 §§6224(c)(3), 6229(b)(1)(B), 6229(d), 6229(e), and 6230(e).

the partners.[48] Once a partnership-level case is filed the existence of a TMP is also highly advantageous to the Tax Court because "the limited partners secure their due process protection as a result of the fact that the TMP stands in a fiduciary relationship toward them."[49]

All partners have a statutory right to a valid TMP. [50] The presence of a valid TMP is especially critical to protecting the due process rights of the nonparticipating partners who would otherwise be denied both effective notice, *albeit* constructive, and representation by their fiduciary of their interests before the Tax Court.

c. The Tax Court Violated the Due Process Rights of the Nonparticipating Partners

Reigler and the other nonparticipating partners, both identified and unidentified, had a statutory right to a fiduciary TMP who would (i) provide them with notice, either actual or constructive, of the Tax Court proceedings, and (ii) represent their interests before the Tax Court in the partnership-level case. These are property rights vested in the nonparticipating partners by statute and they may not be deprived of those rights without due process of law.

The Second Circuit below did not deny that the rules and internal procedures of the Tax Court are subject to the requirements of constitutional due process. Instead it impermissibly limited the taxpayer/partners' due process protections to only notice and an opportunity to be heard. But the Second Circuit previously recognized, correctly, that while notice and an opportunity to be heard – if they are

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[48] §§6226(a), 6227(c), 6228(a), and 6231(a)(7).

[49] *Transpac Drilling Venture 1982-12*, at 225.

[50] §6231(a)(7).

actually given – are the "simplest formulation"[51] of due process:

> Determining precisely the process that is due, however, is more complicated .... The level of procedural safeguards ... is determined by reference to (1) the private interest at stake, (2) the risk of error inherent in the use of one form of procedure over another, and (3) the interest of the government.[52]

Here, the private interest is the right of nonparticipating partners, including Reigler, to effective notice in Tax Court proceedings – actual or constructive – *and* representation in the Tax Court litigation by a valid TMP with a fiduciary responsibility to them.[53]

The risk of error is that the Tax Court's *ad hoc* procedures to avoid appointing a replacement TMP deprived the nonparticipating partners of effective notice that the IRS's abusive whipsaw position would impose tens of thousands of dollars of real liability based on completely bogus, non-existent facts based on a schedule of adjustments enclosed with the 1988 FPAA which was inconsistent with the written determinations within the FPAA. A functioning TMP would have minimized that risk. And if the decision had still resulted in the IRS imposing its abusive whipsaw position at least the nonparticipating partners would have a fiduciary to hold accountable for

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[51] *Patterson v. Coughlin*, 761 F.2d 886, 890 (2nd Cir. 1985), citing *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965); *Giglio v. Dunn*, 732 F.2d 1133, 1135 (2nd Cir.), *cert. denied*, 469 U.S. 932, 105 S.Ct. 328 (1984).

[52] *Patterson* at 890, citing *Mathews v. Eldridge* , 424 U.S. 319, 335 (1976). *See also Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 543 (1985).

[53] *Lambda II*; *Transpac 1982-12*.

their lack of proper notice, as intended by Congress in TEFRA.[54]

In its orders prior to the 1994 and 1995 hearings the Tax Court stated that any partner who did not appear would waive their right to a TMP, and, by implication, their due process rights to notice and representation before the court. [App. 37, 43]

Due process rights may be waived; but such a waiver "is not effective unless the right is intentionally and knowingly relinquished."[55] Here the only evidence in the record that any nonparticipating partner was given notice that they would be denied their due process rights are the mailing lists attached to the orders. Reigler has consistently given the Tax Court the benefit of the doubt and acquiesced that the notices were actually mailed as indicated on the mailing lists. But nowhere has Reigler ever conceded that he *received* those orders. Reigler has consistently stated that he does not remember ever having received them and his records do not reflect that he ever received them. There is no evidence in the record that Reigler or any other nonparticipating partner on the Tax Court's mailing list ever received the orders. The only evidence in the record regarding receipt of the orders is the Tax Court admission in the "notice to partners" that it was not sending the orders to all partners who would be bound by the outcome of the case, and the Tax Court's admissions at the 1994 and 1995 hearings that some of the orders were returned as undeliverable due to bad addresses or other, unknown reasons.

Direct mail has never been held to *per se* satisfy

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54 *Transpac 1982-12* at 225.

55 *Davis Oil Co. v. Mills*, 873 F.2d 774, 787 (5th Cir. 1989).

constitutional notice requirements.[56] Adequacy of notice is always evaluated by reference to the surrounding circumstances.[57] For instance, the Supreme Court has held that notice sent to an incompetent taxpayer was inadequate, notwithstanding that the notice was sent by direct mail.[58]

Here the Tax Court's *ad hoc* procedures attempted to create a *presumption* of a waiver of due process requirements. But this is not permitted.

> To shift in this fashion the burden of compliance with the Due Process Clause almost entirely to the shoulders of individual property owners would eviscerate the protections afforded by the Constitution.[59]

The failure of the nonparticipating partners to attend the hearings was hardly sufficient to constitute an "intentional and knowing" relinquishment by the nonparticipating partners of their due process rights, particularly those the Tax Court acknowledged it was not sending copies of the orders.

The failure of the Tax Court to appoint a replacement TMP for the ten years at issue here, was an impermissible

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[56] *U.S. v. One Toshiba Color Television*, 213 F.3d 147, 153 (3rd Cir. 2000).

[57] See *Mullane v. Central Hanover Bank & Trust, Co.*, 339 U.S. 306, 314 (1950); *Tulsa Professional Collection Services v. Pope*, 485 U.S. 478, 484 (1988) ("The focus is on the reasonableness of the balance, and, as *Mullane* itself made clear, whether a particular method of notice is reasonable depends on the particular circumstances.").

[58] *Covey v. Town of Somers*, 351 U.S. 141, 146-47 (1956).

[59] *Davis Oil* at 788, n. 21, citing *Mennonite Board of Missions v Adams*, 462 U.S. 791, 799 (1983).

taking of the nonparticipating partners' right to a replacement TMP and resulted in a violation of their due process rights by denying them their statutorily mandated fiduciary representative before the Tax Court.

d. The Tax Court Assumed a Duty to Appoint a TMP

By assuming *sole authority* to appoint a TMP in these circumstances, the Tax Court undertook a *duty* to appoint a TMP in these circumstances. This duty arises because appointment of a replacement TMP is mandated by statute and crucial to protect the partners' rights and interests during partnership-level litigation and to ensure the orderly and efficient administration of the controversy.[60]

Here, in an apparent attempt to partially ameliorate the damage caused by its refusal to appoint a TMP, the Tax Court assumed *some*, though not all, of the TMP's duties. But the Tax Court's actions were insufficient to meet its duty to the nonparticipating partners because (i) it failed to provide proper notice, actual or constructive, to all nonparticipating partners, (ii) the notices it did send were patently ambiguous stating that Richard Greenberg was still the TMP, (iii) the administrative records of the Tax

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[60] *Transpac Drilling Venture 1982-12* at 225; *Lambda II* at 1126-1127 ("Without a [TMP] we could not assure that all partners interested in the outcome of this partnership proceeding and who are parties to this litigation pursuant to section 6226(c) will receive sufficient information concerning the litigation to allow them to protect their interests. Moreover, the absence of a [TMP] would prevent the orderly and efficient resolution of the controversy before this Court. Therefore, in order to protect the rights of partners interested in the partnership proceeding before us and to assure the fair, efficient, and consistent disposition of partnership litigation pursuant to §6621 et seq., we draw upon our inherent powers as a Court to appoint a [TMP] in this case."), footnote omitted; *see also Roadway Express Inc. v. Piper*, 447 U.S. 752, 764 (1980); *Link v. Wabash R.R.*, 370 U.S. 626 (1962).

Court continued to list Richard Greenberg as the TMP, [61] and (iv) it failed to represent the interests of the nonparticipating partners in the suit by (a) instructing the partners it did communicate with to seek legal advise from the IRS about a proposed settlement of the issues in dispute, and (b) allowing the unopposed entry of a default decision which subjected all nonparticipating partners to the IRS's patently abusive 1988 whipsaw liability.[62]

Tax Court Rule 250(b) states that the Tax Court "*may*" appoint a replacement TMP if the partnership fails to

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[61] This charade by the Tax Court disproportionally affected the most vulnerable partners – those whom the Tax Court acknowledged it was not serving with notices – to their detriment. Anyone who thought they might be subject to the Tax Court case but had not received any information after January, 1994, when Richard Greenberg ceased to be TMP, could call the docket section of the Tax Court and ask about the status of the case. If they called, even if they called *today*, they would be told that Richard Greenberg was and is the TMP of Cinema '84 and they should contact him for more specific information. The phone number for the Tax Court's docket section is (202) 606-8777. The docket number for the Tax Court case in issue is 621-92.

[62] By its nature, the IRS's abusive 1988 whipsaw position could not have been foreseen by the nonparticipating partners even if they did receive all the materials purportedly sent to them first by Richard Greenberg and then the Tax Court. The potential for this abusive whipsaw liability could only be determined by comparing the schedule of adjustments attached to the Form 870-P enclosed with the 1988 FPAA with the partnership's Form 1065. The written determinations in the FPAA inconsistently indicate that the phantom income resulting in the whipsaw would not be recognized. The TMP is required to keep the nonparticipating partners apprised of the contents of the FPAAs. But there is no requirement that a partners be given a copy of the partnership's Form 1065. The TMP had access to the partnership's Form 1065 and the Tax Court could have obtained a copy from the IRS, but it did not. Nor did the Tax Court ever attempt to provide a copy to the nonparticipating partners or advise them of the whipsaw result of the internally inconsistent FPAA so that they could protect themselves from that resulting bogus liability.

designate a successor. But partnerships may designate a TMP *only* from among the eligible general partners.[63] Rule 250(b) is generic and does not address situations, as here, where there *are no* eligible general partners remaining.

The Second Circuit interprets Rule 250(b) as placing the responsibility to appoint a replacement TMP on the partnership and allowing, but not requiring, the Tax Court to appoint a replacement TMP if the partnership fails to do so in a timely manner. But the Second Circuit ignores the fact that here there are only limited partners remaining, the partnership cannot appoint a limited partner, and the only entity with the authority to appoint a limited partner is the Tax Court. The Second Circuit then acknowledges:

> Of course, the limits of Rule 250, as well as the precedent of the Tax Court, do not preclude us from assigning a duty to the Tax Court in a case where doing so is essential to secure the due process rights of the partners.
>
> [App. 11]

Here the partnership *cannot* appoint a replacement TMP because there are no general partners left for it to choose from. The automatic designation rule does not apply because there are no general partners left for it to apply to. And, the IRS cannot appoint a replacement because the Tax Court has stripped it of its statutory mandate where it is the adversary in pending litigation. In *these* circumstances, where no limited partner is willing to volunteer, the Tax Court is the *only* authority with the ability to secure the due process rights of *all* of the partners by appointing a replacement TMP from among the limited partners. Having taken for itself the *sole authority* to appoint a replacement TMP in these circumstances the only reasonable conclusion

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[63] §6231(a)(7).

is that the Tax Court has undertaken a *duty* to appoint a replacement TMP in these circumstances.

e. Reigler Was Under No Duty to Volunteer to Be TMP

The Second Circuit effectively held, though it did not expressly state, that Reigler and his nonparticipating partners had a duty to volunteer as the new TMP, and by not doing so they each forfeited their statutory right to a TMP and the due process rights afforded them via the TMP.

The Second Circuit cites to no authority for this proposition because there is none. No limited partner, including Reigler, had any duty or was otherwise required to *voluntarily* assume the role of TMP and with it the duties, responsibilities and potentially enormous costs associated with pursuing the partnership-level litigation. Moreover, by voluntarily assuming the role of TMP a limited partner may risk the loss of his limited liability status for taking part in the control of the business.[64]

Further, this *presumption* of a duty to volunteer is not permitted, again, because "[t]o shift in this fashion the burden of compliance with the Due Process Clause almost entirely to the shoulders of individual property owners would eviscerate the protections afforded by the Constitution."[65]

A partner's statutory right to a TMP and his due process

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[64] In appointing a limited partner as TMP the Tax Court may expressly hold that the limited partner does not waive or otherwise lose his limited liability status. *Lambda II* at 1128. But the Tax Court did not offer this protection in any of the materials it sent to some of the limited partners here soliciting a voluntary TMP.

[65] *Davis Oil* at 788, n. 21, citing *Mennonite Board of Missions v. Adams*, 462 U.S. 791, 799 (1983).

rights secured via the TMP are not contingent on his volunteering as a replacement TMP. No partner, including Reigler, was under a duty to volunteer. The Tax Court took for itself the sole authority to appoint a replacement TMP during litigation where, as here, there are no eligible general partners remaining. Therefore, once the partnership-level suit is filed, if the TMP is disqualified and if there are no eligible general partners remaining, then it is the duty of the Tax Court to protect the due process rights of the nonparticipating partners by appointing a replacement TMP from among the limited partners.

f. Ten Years of "TMP-lessness" During Litigation is Unprecedented

The Second Circuit recognizes that the limited partners, more specifically the nonparticipating partners, "secure their due process protection as a result of the fact that the TMP stands in a fiduciary relationship toward them"[66] but then incongruously notes that a TMP is not "absolutely necessary" and that "a 'TMP-lessness' partnership [*sic*] was 'not unprecedented.'" [App. 12]

The implication that periods of TMP-lessness have previously been addressed by the courts and found to be acceptable is correct, but misleading. Every case relied on by the Second Circuit for this proposition, and every case those cases relied on, addressed a period of TMP-lessness *prior* to the filing of a partnership-level Tax Court case.[67]

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[66] *Transpac Drilling Venture 1982-12*, at 225.

[67] *Transpac Drilling Venture 1982-12* (Tax Court docket no. 2417-90) addressed a purported period of TMP-lessness prior to litigation. There, once a partnership-level petition was filed the TMP was identified to the court less than two months later. *Seneca, Ltd. v. Commissioner*, 92 T.C. 363 (1989) addressed whether the IRS was required to appoint a TMP prior to litigation. *Barbados #7 v. Commissioner*, 92 T.C. 804 (1989) addressed a

The only case cited by the Second Circuit to address the due process rights of nonparticipating partners *during pending litigation* is *Lamda II* where the Tax Court held that the orderly administration of the partnership-level case *requires* the existence of a TMP, and the TMP is so important to the functioning of the case that the Tax Court must invoke the court's inherent power to designate a TMP.

The Second Circuit now argues that the Tax Court's failure to appoint a replacement TMP was harmless error because the Tax Court "took considerable measures to safeguard the partners' rights." [App. 12] "[C]onsiderable measures" consisted of failing to keep all partners apprised of the proceedings, instructing the partners who did receive notice to seek legal advise from their adversary, instructing the IRS to communicate directly with the partners without their having the benefit of legal counsel, failing to identify all partners who were parties to the suit, and entering a default judgment against them resulting in the IRS imposing a completely bogus liability against the unrepresented partners.

By taking for itself the sole authority to appoint a replacement TMP while litigation is pending, the Tax Court assumed the statutorily mandated duty to appoint a replacement TMP in a timely manner to protect the rights of the partners, especially those who have not received any notice of the proceedings for whatever reason. Here the Tax Court never appointed a replacement TMP during 10 years of trial and appellate litigation.

a. The Unwilling TMP

It is not clear *why* the Tax Court refused to appoint a replacement TMP but the government argued below that the Tax Court should not be required to appoint an

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period of TMP-lessness prior to litigation and held that no valid partnership-level petition was ever filed.

"unwilling" TMP. This is a non-starter. The obvious answer is for the Tax Court to adopt and adapt the criteria of the "automatic designation" rule.[68]

If no partner volunteers, §6231(a)(7)(B) mandates that the new TMP is the general partner with the largest percentage interest, or, as among equals, the one whose name is first alphabetically.[69] Automatic designation does not require that a general partner be willing in order to be designated, selection is automatic based on the criteria established by Congress. The possibility that he may have to serve as TMP is simply one of the responsibilities he assumes when he chooses to become a partner.

Here, where no general partner is available, the Tax Court could have simply adapted the criteria of §6231(a)(7)(B) and appointed the limited partner with the largest percentage interest, or, as among equals, the one whose name is first alphabetically. As with §6231(a)(7)(B) there is no requirement that the designated limited partner be willing. Selection would automatically be based on the same criteria established by Congress for general partners.

CONCLUSION

This case is an example of why there must be a central, accountable representative monitoring the proceedings and advising the partners in TEFRA partnership-level litigation. Here, the partners were never informed of the effect of the IRS's abusive 1988 whipsaw position and had no way to know that such a bogus liability would be imposed until after they received their bills.

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[68] §6231(a)(7)(B) and Treas. Reg. §301.6231(a)(7)-1(m)(3).

[69] *Amesbury Apartments* at 232-233; *1983 Western* at 62. Nothing negates the "automatic designation" rules under §6231(a)(7)(B) when a Tax Court petition is filed.

Assumption of *some* of the TMP's notice duties did not create a fiduciary relationship between the partners and the Tax Court and did not preserve the due process rights of the nonparticipating partners to notice and representation via their TMP.

The Tax Court's intent – good, bad, or indifferent – is irrelevant.[70] The nonparticipating partners, including Reigler, had a statutory right to a fiduciary TMP through whom they would receive their due process rights to notice and representation in the pending litigation. The Tax Court's failure to appoint a replacement TMP for 10 years and entry of a default decision imposing a completely bogus liability for 1988 on the nonparticipating partners, including Reigler, was a violation of the nonparticipating partners' due process rights which should be reviewed by the court.

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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SEPTEMBER 2005

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[70] *Stanley v. Illinois*, 405 U.S. 645, 656 (1972).

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United States Court of Appeals,

Second Circuit

04-4798-AG

CINEMA '84, Richard M. Greenberg,

Tax Matters Partner,

Petitioners,

Garlon J. Reigler, A non-participating partner,

Appellant,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent-Appellee

Appeal from the United States Tax Court

Argued: May 16, 2005.

Decided: June 22, 2005.

Before: CARDAMONE and KATZMANN , Circuit Judges, KRAVITZ, District Judge. [FN*]

FN* The Honorable Mark R. Kravitz, Judge of the United States District Court for the District of Connecticut, sitting by designation.

KATZMANN, Circuit Judge.

Appellant Garlon J. Reigler appeals from various orders of the Tax Court, including a May 26, 2004 order concluding that the court lacked jurisdiction to vacate a September 1, 2000 order, which dismissed a partnership-level suit and entered a decision in favor of the Internal Revenue Service.

On appeal, Reigler claims that the Tax Court failed to appoint a tax matters partner (TMP) to represent the partnership in the litigation prior to entering the September 1, 2000 order, and consequently, Reigler was deprived of due process. Thus, he contends, this Court should reverse the Tax Court's May 26, 2004 order and require vacatur of the September 1, 2000 order. We disagree and hold that, in this case, the Tax Court was under no duty to appoint a TMP, and hence Reigler was not deprived of due process. We therefore conclude that the Tax Court was without jurisdiction to vacate its September 1, 2000 order.

I.

Reigler was a limited partner in Cinema '84, a Connecticut limited partnership that was formed to purchase and exploit the rights to a number of films. From 1984 to 1989, the tax years at issue, Cinema '84 filed "information returns" with the Internal Revenue Service (IRS). [FN1] In 1991, the IRS audited Cinema '84. At the conclusion of the audits, the IRS issued a Notice of Final Partnership Administrative Adjustment (FPAA) for 1984, 1985, 1986, 1987, 1988, and 1989 and determined that adjustments of the partnership's tax returns were required.

> FN1. Partnerships are not taxable entities under the Internal Revenue Code. *See* 26 U.S.C. §701. Therefore, instead of filing traditional tax returns, they file "information returns." *See* 26 U.S.C. §6031; 26 C.F.R. §1.6031(a) -1.

Richard Greenberg was the TMP for Cinema '84. A TMP is "the partner designated to act as a liaison between the partnership and the Internal Revenue Service in administrative proceedings, and as a representative of the partnership in judicial proceedings." *Addington v. Comm'r*, 205 F.3d 54, 60 (2d Cir.2000). In 1992, Greenberg, in his

capacity as TMP, filed a petition on behalf of Cinema '84 in United States Tax Court, seeking a redetermination of the adjustments contained in the FPAAs. In January 1994, Greenberg was placed in involuntary bankruptcy and became disqualified to serve as the TMP.

The Tax Court attempted to find a successor TMP on a number of occasions. On June 29, 1994, the Tax Court issued an order explaining, in pertinent part:

> Some of the individual partners have reached a basis for settlement, but these settlements have not been implemented because of the absence of tax matters partners. The Court intends to schedule these cases for a pretrial hearing to consider the appointment of tax matters partners and whether the pending cases will be pursued in the Court by any limited partners. In order to ensure that the individual partners ... are informed of the contents of this order and attached notice, the Court is serving a copy of this order and the attached notice on all partners in the partnership to the extent that they have been identified to the Court.

The court ordered each partner served to appear at a pretrial hearing on September 22, 1994 and stated, "if there is no appearance at this pretrial hearing by any partner of this partnership, unless the case has been disposed of by settlement prior thereto, the Court will dismiss this case and enter a decision in accordance with the amount determined by respondent," the Commissioner of the IRS ("Commissioner").

The "Notice to Partners" accompanying the order explained, in part, that as a result of involuntary bankruptcy proceedings filed against the former TMP, the partnership was without any active TMP. The notice warned, "there still may be substantial tax liabilities resulting from these proceedings for all direct and indirect partners." In addition, it cautioned:

> Any non-settling partner who does not appear in person or by a duly authorized representative will be deemed by the Court to have waived any rights under the Internal Revenue Code or the Tax Court Rules of Practice and Procedure to the appointment of a tax matters partner and to further notice of proceedings in this case. If there is no appearance by any partner of a partnership, that case will be dismissed. ....
>
> Counsel for [the Commissioner] has advised the Court that he has developed a settlement position with regard to this case that he is willing to offer to any partner requesting that settlement before the hearing on September 22, 1994. If a partner has any questions concerning that settlement, you or your representative should immediately contact [the Commissioner's representative].

Reigler concedes that the June 29, 1994 order and Notice to Partners were sent to him and admits that he nonetheless did not attend the September 22, 1994 hearing. No partner at the September 22, 1994 hearing advised the court that he or she desired to be appointed the TMP or to litigate the issues.

On December 21, 1994, the court issued another order, which provided, in part:

> The Court must now determine which, if any[,] partners desire to actively participate in this litigation as participating partners, or to be appointed a tax matters partner so that this case may proceed to trial.
>
> This is the partners *last chance* to advise the Court of their desire to participate in this litigation of this case. The failure of any partner to appear who has

> not settled will constitute a waiver of the right to prosecute this case as to the non-appearing partner, and may result in the dismissal of this case for failure to properly prosecute and entry of decision in favor of [the Commissioner] for the adjustments set forth in the Notice of [FPAA].

The court ordered each partner who wished to participate in the proceeding to file a motion for leave to elect to participate by January 17, 1995. In addition, the court required those partners who desired to serve as TMP to file a request with the court by January 17, 1995. Another pretrial hearing was scheduled for February 8, 1995. Again the court cautioned, "if there is no appearance at this pretrial hearing by any partner of this partnership, ... the Court will dismiss this case and enter a decision in accordance with the amount determined by [the Commissioner]." And again the court warned that "if a tax matters partner is not identified and selected by the close of the pretrial hearing, the Court will dismiss this case and enter a decision in accordance with the amount determined by [the Commissioner]." The clerk of the court was ordered to serve each identified partner with a copy of the order and a notice substantially similar to the "Notice to Partners" accompanying the June 29, 1994 order. Reigler concedes that, as with the prior order and notice, these materials were sent to him, yet he did not attend the February 8, 1995 hearing.

A number of partners were present or represented at the February 8, 1995 hearing. None of them, however, indicated a desire to prosecute the case or to be appointed TMP.

On July 10, 1995, the Commissioner moved to dismiss the case for failure to prosecute. The court held the motion in abeyance while it decided other motions concerning specific partners that were potentially dispositive.

On February 3, 1999, the court ordered yet another pretrial hearing and scheduled it for July 6, 1999. In its order, the court warned: "IF THERE IS NO APPEARANCE BY OR ON BEHALF OF A PARTNER WHO WILL PROSECUTE THIS MATTER, THE COURT WILL DISMISS THIS CASE FOR FAILURE TO PROPERLY PROSECUTE AND ENTER A DECISION SUSTAINING [the Commissioner's] DETERMINATION IN FULL. THIS HEARING WILL NOT BE CONTINUED FOR ANY REASON." The court again ordered the clerk of the court to send the order to all identified partners, including Reigler. Reigler concedes that the order was sent to him, but for a third time, he did not attend the scheduled hearing.

On September 1, 2000, after various settlements were finalized on behalf of a number of partners, the Tax Court (Wells, *C.J.*) granted the Commissioner's motion to dismiss the action as to those partners who did not settle. Again, the court ordered the clerk to serve the order on all identified partners on the attached list, including Reigler.

Reigler did not file a post-decision motion to vacate or revise the decision. However, one partner Karin Locke, did timely appeal to this Court on grounds specific to her. We subsequently reversed and remanded with directions to dismiss the petition with respect to Ms. Locke. *See generally Cinema '84 v. Comm'r*294 F.3d 432 (2d Cir.2002) (per curiam). The Tax Court entered an order dismissing Ms. Locke from the suit on March 24, 2003.

Finally, on December 9, 2003-more than eight months after the Tax Court entered an order dismissing the suit against Locke and more than three years after the Tax Court dismissed the action for failure to prosecute-Reigler filed a number of motions, essentially seeking to vacate the underlying September 1, 2000 dismissal by the Tax Court. Reigler argued that the prior dismissal should be vacated because it was "filed without the participation of a valid

TMP" and that the Tax Court's failure to appoint a TMP violated the partners' due process rights. Reigler additionally requested that the Court appoint him as the TMP.

On March 23, 2004, the Tax Court denied Reigler's motions. The court considered whether it had the authority to vacate a final order under any circumstances, and it concluded that it did; however, the court determined that its authority was limited and extended only to cases in which there had been a fraud on the court, a lack of jurisdiction, or the presence of a clerical error. The court concluded that none of the exceptions applied, that it therefore lacked jurisdiction to entertain Reigler's applications, and that vacatur was consequently not proper in this case. Special Trial Judge Powell explained:

> Irrespective of which standard ... is used, movant's allegations fall far short for purposes of vacating our decision in this case. He alleges that the named tax matters partner (TMP), Richard M. Greenberg, was in bankruptcy and was disqualified as the TMP. This is correct. Movant then asserts that either the Tax Court or [the Commissioner] should have appointed a new TMP. This ignores the fact that, since 1995, the Court attempted in vain to find a limited partner who would be willing to serve as the TMP. Finally, movant alleges that the Court's affirmance of [the Commissioner's] determinations created a whipsaw that "is patently unreasonable, unfair, unjust and inequitable." We are willing to assume that this is also correct. But the fact is that none of these allegations, standing alone or together, constitute a fraud on the Court or other valid reason for vacating a final decision of this Court.

Cinema '84 v. Comm'r, 122 T.C. 264, 271, 2004 WL 566246 (2004). Reigler filed a motion for reconsideration on June 25, 2004, which the Tax Court denied on July 6, 2004.

Reigler now appeals the Tax Court's refusal to reopen the proceedings.[FN2] Reigler presses many arguments, all of which essentially claim that the Tax Court had a duty to appoint a TMP and its failure to do so deprived Reigler of due process, thereby warranting vacatur of the Tax Court's underlying decision. We disagree, and write to clarify that, in this case, the Tax Court was under no obligation to appoint a TMP.

> FN2. Reigler's notice of appeal contends*inter alia*, that he additionally appeals the Tax Court's September 1, 2000 order; however, such an appeal would be time-barred and is consequently not properly before this Court. *See* Fed. R.App. P. 13.

II.

A.

We review a Tax Court's denial of a motion to vacate a final decision for abuse of discretion. *See Senate Realty Corp. v. Comm'r*, 511 F.2d 929, 931 (2d Cir.1975). However, whether the Tax Court had jurisdiction to consider a motion is a question of law, which we review*de novo*. *See Merrill Lynch & Co. v. Comm'r*, 386 F.3d 464, 469 (2d Cir.2004).

B.

Section 7481 of the Internal Revenue Code provides that if a decision of the Tax Court has been modified or reversed by the Court of Appeals, as in this case, then the decision of the Tax Court "rendered in accordance with the mandate of the United States Court of Appeals shall become final on the expiration of 30 days from the time such decision of the Tax Court was rendered." 26 U.S.C. §7481(a)(3)(B). In compliance with this Court's decision in *Cinema '84 v.*

Commissioner, 294 F.3d 432 (2d Cir.2002) (per curiam), the Tax Court entered an order dismissing Karin Locke from the suit on March 24, 2003, and its decision became final 30 days later. [FN3]

> FN3. While Reigler disagrees with the Tax Court's conclusion as to when the court's decision became final, he concedes that the decision was final when he filed his motions.

Several Courts of Appeals have suggested that once the Tax Court's decision becomes final, the court no longer has the authority to vacate its decision. *See, e.g., Harbold v. Comm'r*, 51 F.3d 618, 621 (6th Cir.1995); *Webbe v. Comm'r*, 902 F.2d 688, 689 (8th Cir.1990); *see also Lentin v. Comm'r*, 243 F.2d 907, 909 (7th Cir.1957) (concluding without discussion that "the Tax Court was without jurisdiction" to set aside or modify a decision that became final). Other Courts of Appeals have recognized limited exceptions to the rule that a Tax Court does not have jurisdiction to vacate a decision that has become final. For example, courts have recognized an exception where a "fraud on the court" has been committed. *See, e.g., Drobny v. Comm'r*, 113 F.3d 670, 677 (7th Cir.1997); *Toscano v. Comm'r*, 441 F.2d 930, 933 (9th Cir.1971); *see also Senate Realty Corp.*, 511 F.2d at 931 n. 1 (suggesting, but not directly holding, that such an exception exists). In addition, courts have found vacatur warranted where the Tax Court lacked jurisdiction in the first place. *See Billingsley v. Comm'r*, 868 F.2d 1081, 1084-85 (9th Cir.1989); *see also Abeles v. Comm'r*, 90 T.C. 103, 105-06, 1988 WL 2747 (1988). Finally, the Seventh Circuit has held that the Tax Court has the authority to vacate a final decision that contains a clerical error that was not discovered until after the decision became final. *See Michaels v. Comm'r*, 144 F.3d 495, 497-98 (7th Cir.1998).

This Court has rejected the strict rule that the Tax Court, without exception, lacks jurisdiction to vacate a decision

that has become final. *See Senate Realty Corp.*, 511 F.2d at 931 n. 1. However, we have not explicitly adopted any of the exceptions to the general rule, discussed *supra*. In any event, it is unnecessary for us to decide in the present case which, if any, of the exceptions this Court recognizes because regardless of how Reigler's argument is characterized, vacatur was not warranted here, where the Tax Court was under no duty to appoint a TMP and its failure to do so did not deprive Reigler of due process. [FN4]

FN4. Reigler couches his arguments in terms of Rule 60 of the Federal Rules of Civil Procedure, and complains that the Tax Court failed to consider its authority to vacate its judgment pursuant to that rule.

It is worth noting that the Tax Court has its own rules of procedure. Tax Court Rule 162 addresses motions to vacate a decision of the Tax Court, but does not provide guidance as to whether a decision of the Tax Court can be vacated if it has become final, and if so, under what circumstances. Tax Ct. R. 162. Tax Court Rule 1, however, provides that "[w]here in any instance there is no applicable rule of procedure, the Court or the Judge before whom the matter is pending may prescribe the procedure, giving particular weight to the Federal Rules of Civil Procedure to the extent that they are suitably adaptable to govern the matter at hand." Tax Ct. R. 1. Hence, it was within the Tax Court's discretion to consider whether vacatur was warranted pursuant to Rule 60.*See, e.g., Michaels*,144 F.3d at 497 (considering whether vacatur was justified under Rule 60(a) of the Federal Rules of Civil Procedure). However, because we conclude that Reigler was not deprived of due process and his arguments are therefore without merit, it is unnecessary for us to decide whether the Tax Court abused its discretion by failing to contemplate vacatur pursuant to Rule 60.

Tax Court Rule 250 provides that "if a partner's status as the tax matters partner is terminated ..., then the Court *may* appoint another partner as the tax matters partner if the partnership fails to designate a successor tax matters partner within such period as the Court may direct." Tax Ct. R. 250(b) (emphasis added); *see also* 26 U.S.C. §7453 (authorizing the Tax Court to prescribe its own rules of procedure). The clear language of the rule indicates that responsibility for designating a successor TMP lies with the partnership, not with the Tax Court; if, however, the partnership fails to appoint a TMP, the Tax Court *may*, not must, appoint a successor. Thus, while the Tax Court could have appointed a successor TMP when Greenberg's status as the TMP was terminated, it was not required to do so.

Computer Programs Lambda, Ltd. v. Commissioner, 90 T.C. 1124, 1988 WL 54149 (1988) [hereinafter *CPL II*], upon which Reigler relies, does not suggest otherwise. In *CPL II*, the Tax Court considered whether it had the authority to appoint a limited partner as the TMP where, prior to the commencement of the partnership level suit, all the general partners had become disqualified, *see id.* at 1125; *Computer Programs Lambda, Ltd. v. Comm'r*, 89 T.C. 198, 200-03, 1987 WL 42563 (1987) [hereinafter *CPL I*], and where the partnership, itself, had failed to elect a new TMP, despite the court's urging, *CPL II*, 90 T.C. at 1125-26. Recognizing the importance of a TMP, *see id.* at 1126, the *CPL II* court held that it was within its "inherent powers as a Court to appoint a tax matters partner," *id.* at 1127. But the Tax Court stopped short of holding that the Tax Court had a *duty* to appoint a TMP. Accordingly, Reigler's reliance on *CPL II* is misplaced.

Of course, the limits of Rule 250, as well as the precedent of the Tax Court, do not preclude us from assigning a duty to the Tax Court in a case where doing so is essential to secure the due process rights of the partners. *Cf. CPL II*, 90 T.C. at 1126 (noting the importance of a TMP in ensuring the "fair,

efficient and consistent disposition of partnership proceedings"); *Transpac Drilling Venture 1982-12 v. Comm'r,* 147 F.3d 221, 225, 228 (2d Cir.1998) (finding that a TMP, once appointed, has a fiduciary duty to the limited partners, who "secure their due process protection as a result of the fact that the TMP stands in a fiduciary relationship toward them," but nonetheless concluding that a TMP was not absolutely necessary and noting that a "TMP-lessness" partnership was "not unprecedented"). However, this is not such a case. Here, the Tax Court took considerable measures to safeguard the partners' rights. The court regularly kept the partners abreast of the status of the proceedings: the court's orders, accompanied by a notice to partners, were mailed to each identified partner, including *373 Reigler.[FN5] Together, the orders and notices warned the partners of potential tax liabilities and advised them of settlement offers by the Commissioner. More importantly, they alerted the partners to the numerous pretrial hearings at which the court would consider the appointment of a TMP, and urged the partners to attend the hearings. The notices and orders made clear the importance of a TMP, that the partnership was without one, and that the litigation could not go forward until a partner willing to serve as the TMP came forward. Finally, the court repeatedly warned that if no partner was willing to serve in such capacity, the case would be dismissed and a decision entered in favor of the Commissioner. Thus, the Tax Court fully appreciated the function of the TMP, assumed the TMP's responsibility of informing the partners, provided ample opportunity for the partners to come forward and be heard, and made substantial efforts to have a successor TMP promptly selected. Reigler was accordingly afforded notice and an opportunity to be heard; due process requires nothing more in this instance.

FN5. Reigler makes much of the fact that the Tax Court did not send the orders and notices to all partners, but

only to those the court was able to identify. Certainly, if one of the unidentified partners was before us, they might have a colorable due process claim. However, Reigler nowhere contends that he did not receive notice. Indeed, Reigler concedes that the orders and notices were sent to him. Reigler therefore cannot claim that he, personally, was deprived of due process.

Reigler, however, failed to heed the Tax Court's warnings and neither settled with the Commissioner nor entered an appearance at any of the hearings. In addition, even after the Tax Court dismissed the suit and entered a decision in favor of the Commissioner, Reigler failed to file a post-decision motion to vacate or revise the decision. Indeed, Reigler never spoke up until after he received the tax bill. At that point, it was too late. The Tax Court's judgment had become final, and because Reigler cannot establish any grounds justifying departure from the general finality rule in this case, the Tax Court is without jurisdiction to vacate its final order.

Reigler's remaining claims are plainly without merit.

Accordingly, the May 26, 2004 decision of the Tax Court is hereby Affirmed.

United States Tax Court.

CINEMA '84, Richard M. Greenberg,
Tax Matters Partner,

Petitioner

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent

No. 621-92.

March 23, 2004.

OPINION

DAWSON, J.

In this TEFRA partnership proceeding, the Court entered an Order of Dismissal and Decision, and that decision was appealed to the Court of Appeals for the Second Circuit. The Court of Appeals affirmed in part and reversed in part the decision of this Court, and, in accord with the mandate, this Court issued an order dismissing this case for lack of jurisdiction as to a participating partner. The Court's Order of Dismissal and Decision is otherwise final under sec. 7481(a), I.R.C.

M, a partner of the partnership who had not previously participated in this proceeding, filed a motion for leave to file notice of election to participate out of time and lodged with the Court a motion to vacate order of dismissal and decision and a motion to be appointed tax matters partner.

Held: The motion to vacate was properly submitted to this Court, without leave of the Court of Appeals, under *Standard Oil Co. of Cal. v. United States,* 429 U.S. 17, 97 S.Ct. 31, 50 L.Ed.2d 21 (1976), and *Lydon v. Commissioner,* 56 T.C. 128, 1971 WL 2541 (1971), is overruled and will no longer be followed because of the Supreme Court decision.

Held, further, M has not alleged proper grounds for vacating a final decision of this Court.

Held, further, the same standards apply for vacating a final decision in a TEFRA proceeding as in a deficiency case.

This case was assigned to Special Trial Judge Carleton D. Powell pursuant to the provisions of section 7443A(b)(5) [FN1] and Rules 180, 181, and 183. The Court agrees with and adopts the opinion of the Special Trial Judge set forth below.

OPINION OF THE SPECIAL TRIAL JUDGE

POWELL, J.

This case is before the Court on a Motion for Leave to File Notice of Election to Participate Out of Time filed on behalf of Garlon J. Riegler (movant) on December 9, 2003. Together with that motion he lodged with the Court a Motion to Vacate Order of Dismissal and Decision and a Motion to be Appointed Tax Matters Partner.

This case is a so-called TEFRA partnership proceeding under sections 6221-6233 and involves disallowed deductions claimed with respect to a motion picture promotion. The Court held pretrial conferences on September 21-22, 1994, and on February 8, 1995. At those conferences, none of the partners who appeared indicated a desire to prosecute this case or other similar cases. Furthermore, there is no active tax matters partner in this case.

On July 10, 1995, respondent filed a Motion to Dismiss for Failure to Properly Prosecute. That motion was held in abeyance while the Court disposed of potentially dispositive motions concerning certain partners who had elected to participate. The Court disposed of those motions. See *Greenberg Bros. Pship. # 4 v. Commissioner,* 111 T.C. 198, 1998 WL 525708 (1998), affd. in part and revd. in part sub

nom. *Cinema '84 v. Commissioner,* 294 F.3d 432 (2d Cir.2002).

This case was calendared for hearing on respondent's Motion to Dismiss for Failure to Properly Prosecute at the Special Session of the Court held on July 6, 1999. The order provided that "IF THERE IS NO APPEARANCE BY OR ON BEHALF OF A PARTNER WHO WILL PROSECUTE THIS MATTER, THE COURT WILL DISMISS THIS CASE FOR FAILURE TO PROPERLY PROSECUTE AND ENTER A DECISION SUSTAINING RESPONDENT'S DETERMINATION IN FULL." The order was served on all the partners who were still linked to the partnership proceeding. At the hearing the only appearance was made by counsel for some of the participating partners who asked the Court to delay the dismissal for 90 days to determine whether there was any partner who wished to proceed with the litigation and would become the tax matters partner. That time was subsequently extended to November 4, 1999. There was no appearance by any partner who desired to prosecute this case. On June 23, 2000, respondent filed a Notice of Consistent Agreement. By an Order of Dismissal and Decision entered on September 1, 2000, respondent's Motion to Dismiss for Failure to Properly Prosecute filed July 10, 1995, was granted, and respondent's determinations of partnership adjustments for the taxable years 1985, 1986, 1987, 1988, and 1989 were sustained.

The order of dismissal and decision was appealed with respect to the Court's holding that certain partners were not entitled to a consistent settlement and whether one partner, Karin M. Locke, was still properly before the Court. The Court of Appeals for the Second Circuit affirmed as to the first issue and reversed as to the second. *Cinema '84 v. Commissioner, supra.* The Mandate of the Court of Appeals for the Second Circuit was filed May 21, 2002, and no petition for a writ of certiorari was filed. On March 24, 2003, the Court issued an order dismissing Karin M. Locke

for lack of jurisdiction in conformity with the Mandate of the Court of Appeals for the Second Circuit. The decision of this Court became final on April 23, 2003. See sec. 7481(a)(3)(B).

On December 9, 2003, a Motion for Leave to File Notice of Election to Participate Out of Time (motion for leave) was filed on behalf of movant. The motion alleges that movant is a partner in the Cinema '84 partnership and requests that he be appointed the tax matters partner for the partnership. With the motion, movant lodged with the Court a motion to vacate order of dismissal and decision and a motion to be appointed tax matters partner.

The raison d'être of movant's motion for leave is to have the Court vacate its decision entered September 1, 2000, that sustained respondent's determinations with regard to the taxable years 1985, 1986, 1987, 1988, and 1989 of Cinema '84. In resolving the question whether leave should be granted, we must first decide whether the Court's decision should be vacated. That decision was entered September 1, 2000, and modified on March 24, 2003, pursuant to the Mandate of the Court of Appeals for the Second Circuit. With respect to all the partners who had not previously settled, with the exception of Karin M. Locke, the Court's decision was affirmed by the Court of Appeals for the Second Circuit and is final.

1. *Authority of the Tax Court To Vacate a Decision*

While not raised in the motion to vacate lodged with the Court, the initial question is whether this Court has the authority to reopen a case where the decision of this Court has been affirmed, modified, or reversed by the Court of Appeals. In *Lydon v. Commissioner*, 56 T.C. 128, 1971 WL 2541 (1971), the Court was faced with a "Motion for Leave to File a Petition to Reopen Proofs [sic]" filed after the decision of this Court had been affirmed by the Court of Appeals. [FN2] The gravamen of the motion was that the

decision of this Court was based on perjured testimony. We assumed that the allegation was correct. Nonetheless, we found that the motion was "analogous to one filed in a Federal District Court under Rule 60(b) of the Federal Rules of Civil Procedure", *id.* at 129, and we applied the then majority view "that since the decided cases reveal that Rule 60(b) * * * does not change the usual requirement of leave of the appellate court, *a fortiori,* such leave is required where, as is the case herein, the Federal Rules of Civil Procedure are not technically applicable to this Court", *id.* at 131.

In *Transp. Manufacturing & Equip. Co. v. Commissioner,* T.C. Memo.1971-178, a decision of this Court had been appealed to the Court of Appeals for the Eighth Circuit, but taxpayer had not raised a specific issue on appeal. [FN3] The case was remanded to this Court on other grounds, and taxpayer sought to have our original decision vacated as to the issue that had not been appealed. This Court, in rejecting taxpayer's argument, noted:

> decisions of this Court may be reviewed by the Courts of Appeals and by those courts alone. In turn, judgments of the Courts of Appeals with respect to * * * decisions of this Court may be reviewed by the Supreme Court and by that Court alone. Our assumption of jurisdiction to amend a judgment of the Eighth Circuit [in this case] would be, in effect, a review of that court's judgment, and, hence, a transgression not only of the traditional jurisdictional limits described in *William D. Lydon, supra,* but also of the statutory jurisdictional limits established by section 7482(a).

The final word on a trial court's authority to reopen a decision or judgment after it has been affirmed, modified, or reversed by a Court of Appeals, however, had not been spoken. In *Standard Oil Co. of Cal. v. United States,* 429

U.S. 17, 97 S.Ct. 31, 50 L.Ed.2d 21 (1976), the Supreme Court affirmed the judgment of a lower court. Subsequently, after the mandate of the Supreme Court was issued, the corporation moved to recall the mandate and have the lower court's judgment set aside under rule 60(b) of the Federal Rules of Civil Procedure. The Supreme Court recognized:

> that in the past both this Court and many Courts of Appeals have required appellate leave before the District Court could reopen a case which had been reviewed on appeal. The requirement derived from a belief that an appellate court's mandate bars the trial court from later disturbing the judgment entered in accordance with the mandate. It has also been argued that the appellate-leave requirement protects the finality of the judgment and allows the appellate court to screen out frivolous Rule 60(b) motions. [*Id.* at 18; fn. ref. and citations omitted.]

The Supreme Court, however, held:

> In our view, the arguments in favor of requiring appellate leave are unpersuasive. Like the original district court judgment, the appellate mandate relates to the record and issues then before the court, and does not purport to deal with possible later events. Hence, the district judge is not flouting the mandate by acting on the motion. Furthermore, the interest in finality is no more impaired in this situation than in any Rule 60(b) proceeding. Finally, we have confidence in the ability of the district courts to recognize frivolous Rule 60(b) motions. Indeed, the trial court "is in a much better position to pass upon the issues presented in a motion pursuant to Rule 60(b)".

The appellate-leave requirement adds to the delay and expense of litigation and also burdens the increasingly

scarce time of the federal appellate courts. We see no reason to continue the existence of this "unnecessary and undesirable clog on the proceedings." *Id.* at 18-19; citations omitted.]

In light of *Standard Oil Co. of Cal.*, we conclude that *Lydon v. Commissioner, supra,* and its progeny are no longer viable. In *Lydon* we analogized the situation to that of a district court under rule 60(b) of the Federal Rules of Civil Procedure and relied on, inter alia, *Hazel-Atlas Co. v. Hartford Co.*, 322 U.S. 238, 64 S.Ct. 997, 88 L.Ed. 1250 (1944), *Tribble v. Bruin,* 279 F.2d 424 (4th Cir.1960), and *Home Indem. Co. v. O'Brien,* 112 F.2d 387 (6th Cir.1940). The reasoning in those cases was specifically rejected by the Supreme Court in *Standard Oil Co. of Cal. v. United States, supra.*

It may be argued that our opinion in *Transp. Manufacturing & Equip. Co. v. Commissioner, supra,* also rests on the language of section 7482(a) and is not governed by the same principles as cases under rule 60(b) of the Federal Rules of Civil Procedure, notwithstanding the analogy drawn in *Lydon.* Section 7482(a), however, provides that the review of Tax Court decisions shall be "in the same manner and to the same extent as decisions of the district courts in civil actions tried without a jury". If a district court could not entertain a motion to vacate without the intervention of the Court of Appeals, it would follow that the Tax Court also cannot, and this was the holding of *Lydon* and its progeny. On the other hand, the converse is that, if the district courts can entertain motions to vacate, the Tax Court can do likewise. Accordingly, because of the Supreme Court's holding in *Standard Oil Co. of Cal.*, we will no longer follow the *Lydon* case or its progeny. We hold that the Tax Court has the authority to act on a motion to vacate a decision that has been affirmed, reversed, or modified by the Court of Appeals.

2. *Standards for Vacating a Final Decision*

Notwithstanding the authority to act on such a motion, the authority of the Tax Court to vacate a decision that has become final is limited. In *Taub v. Commissioner,* 64 T.C. 741, 1975 WL 3167 (1975), affd. without published opinion 538 F.2d 314 (2d Cir.1976), the taxpayer in a deficiency case sought to vacate a decision that had become final. We noted that as a general rule the finality of a decision is absolute. *Id.* at 750; see also *Lasky v. Commissioner,* 235 F.2d 97 (9th Cir.1956), affd. per curiam 352 U.S. 1027, 77 S.Ct. 594, 1 L.Ed.2d 598 (1957);*Abatti v. Commissioner,* 86 T.C. 1319, 1323, 1986 WL 22149 (1986), affd. 859 F.2d 115 (9th Cir.1988). We also noted that "we have jurisdiction to set aside a decision which would otherwise be final where there is 'fraud on the court.' " *Taub v. Commissioner,* 64 T.C. at 751 (citing *Toscano v. Commissioner,* 441 F.2d 930 (9th Cir.1971)); *Kenner v. Commissioner,* 387 F.2d 689 (7th Cir.1968); see also *Drobny v. Commissioner,* 113 F.3d 670 (7th Cir.1997), affg. T.C. Memo.1995-209; *Senate Realty Corp. v. Commissioner,* 511 F.2d 929 (2d Cir.1975).

In *Abeles v. Commissioner,* 90 T.C. 103, 1988 WL 2747 (1988), this Court held that it had the authority to vacate an otherwise final decision in a situation where the Court never acquired jurisdiction over the petitioner. Accord *Billingsley v. Commissioner,* 868 F.2d 1081 (9th Cir.1989); *Brannon's of Shawnee, Inc. v. Commissioner,* 69 T.C. 999, 1978 WL 3327 (1978).

This Court has also vacated a final decision in the situation where there was a clerical error in the decision document that was not discovered until after the decision had become final. See *Michaels v. Commissioner,* 144 F.3d 495 (7th Cir.1998), affg. T.C. Memo.1995-294. [FN4]

The Court of Appeals for the Sixth Circuit held that a final decision of the Tax Court could be vacated in situations involving a mutual mistake. *Reo Motors, Inc. v.*

Commissioner, 219 F.2d 610 (6th Cir.1955). However, in a more recent case, *Harbold v. Commissioner,* 51 F.3d 618, 622 (6th Cir.1995), the Court of Appeals for the Sixth Circuit held that *Reo Motors, Inc.* was overruled by the Supreme Court in *Lasky v. Commissioner,* 352 U.S. 1027, 77 S.Ct. 594, 1 L.Ed.2d 598 (1957), and that the Court of Appeals for the Sixth Circuit would no longer follow the rationale of *Reo Motors, Inc.*

3. *Movant's Grounds for Vacating the Decision*

Irrespective of which standard of the cases discussed above is used, movant's allegations fall far short for purposes of vacating our decision in this case. He alleges that the named tax matters partner (TMP), Richard M. Greenberg, was in bankruptcy and was disqualified as the TMP. This is correct. Movant then asserts that either the Tax Court or respondent should have appointed a new TMP. This ignores the fact that, since 1995, the Court attempted in vain to find a limited partner who would be willing to serve as the TMP. Finally, movant alleges that the Court's affirmance of respondent's determinations created a whipsaw that "is patently unreasonable, unfair, unjust and inequitable." We are willing to assume that this is also correct. But the fact is that none of these allegations, standing alone or together, constitute a fraud on the Court or other valid reason for vacating a final decision of this Court. [FN5]

In concluding, we note that the decided cases regarding vacating a final decision of the Court involve so-called deficiency cases rather than TEFRA partnership cases. The current section 7481(a) is derived from section 1005(a) of the Revenue Act of 1926, ch. 27, tit. X, 44 Stat. 10. The legislative history states:

Inasmuch as the statute of limitations upon assessments and suits for collection, both of which are suspended during review of the Commissioner's determination, commences to run upon the day upon which the Board's [of Tax Appeals]

decision becomes final, it is of utmost importance that this time be specified as accurately as possible. In some instances in order to achieve this result the usual rules of law applicable in court procedure must be changed. * * * [S. Rept. 52, 69th Cong., 1st Sess. (1926), 1939-1 C.B. (Part 2) 332, 360.]

The legislative history of the TEFRA proceeding specifies that "The principles of section 7481(a) shall govern in determining the date on which a court decision becomes final." H. Conf. Rept. 97-760, at 608 (1982), 1982- 2 C.B. 600, 666.

As the Court of Appeals for the Ninth Circuit observed, Congress in enacting section 7481 "was conscious of the need that 'finality' be clearly defined, so that the process of collection can proceed unimpeded." *Toscano v. Commissioner, supra* at 932. While this concern is apparent in deficiency cases, its force is at least as great in TEFRA partnership cases. The liability of not just one taxpayer is at stake; rather, it is the liabilities of potentially all of the partners in the partnership. Thus, if we were to vacate a final decision in a TEFRA case, the result clearly would impede the collection process. We believe, therefore, that the reasoning underlying the cases restricting the vacating of final decisions of this Court applies, perhaps even more strongly, to partnership cases.

There are no viable grounds for vacating the final decision in this case. Accordingly, granting movant's motion for leave would be nothing more than an act of futility, and the motion will be denied.

An order denying the Motion for Leave to File Notice of Election to Participate Out of Time will be issued.

FN1. Unless otherwise indicated, section references are to the Internal Revenue Code in effect at relevant times. Rule

references are to the Tax Court Rules of Practice and Procedure.

FN2. See *Lydon v. Commissioner*, T.C. Memo.1964-27, affd. 351 F.2d 539 (7th Cir.1965).

FN3. See *Transp. Manufacturing & Equip. Co. v. Commissioner*, T.C. Memo.1968-189, affd. in part and vacated in part 434 F.2d 373 (8th Cir.1970).

FN4. The Court of Appeals for the Eighth Circuit has held that the Tax Court lacks jurisdiction to vacate a final decision in the absence of "extraordinary circumstances." See *Ark. Oil & Gas, Inc. v. Commissioner*, 114 F.3d 795, 798 (8th Cir.1997).

FN5. Indeed, we note that, putting aside the problem with the finality of the decision, the movant offers no explanation as to the reason for his failure to timely move to participate in this proceeding.

United States Tax Court
Washington, D.C. 20217

CINEMA '84, RICHARD M. GREENBERG, TAX MATTERS PARTNER,	§	
Petitioner	§	Docket No. 621-92.
v.	§	GREENBERG
	§	BROTHERS
COMMISSIONER OF INTERNAL REVENUE,	§	
Respondent	§	

ORDER

This case is one of a number of partnership cases involving the acquisition and distribution of motion picture films. The general partner and tax matters partner of each such partnership were Richard M. Greenberg and/or A. Frederick Greenberg. A tax matters partner is necessary in order to have the cases efficiently resolved. See secs. 6621, et seq., of the Internal Revenue Code. Both Richard M. and A. Frederick Greenberg were placed in involuntary bankruptcy, thus causing them to be disqualified as tax matters partners for the partnerships, and the partnership cases are now without tax matters partners. Some of the individual partners have reached a basis for settlement, but these settlements have not been implemented because of the absence of the tax matters partners. The Court intends to schedule these cases for a pretrial hearing to consider the appointment of tax matters partners and whether the pending cases will be pursued in the Court by any limited partners. In order to ensure that the individual partners in the above captioned partnership are informed of the contents of this order and attached notice, the Court is serving a copy of this order and the attached notice on all partners in the partnership to the extent that they have been identified to the Court. Accordingly, it is

ORDERED that this case is calendared for a pretrial hearing at the Special Session of the Court commencing at 10:00 a.m. on September 22, 1994, in Room 208, Jacob K. Javits Federal Building, 26 Federal Plaza, New York, New York 10278. The purpose of the hearing is to determine whether this case will be tried and, if so, to determine the most expeditious manner for proceeding. The Court will hear motions, if any, regarding the status and, where necessary, the appointment of a tax matters partner. It is further

ORDERED that, in addition to the usual service of this order, the Clerk of the Court shall serve a copy of this order with attached notice to the partners in the partnership whose names and addresses are shown in the attached list. It is further

ORDERED that, if a basis of settlement has been reached, a report by respondent so notifying the Court of the names of the settling partners shall be submitted no later than the call of the calendar. It is further

ORDERED that if there is no appearance at this pretrial hearing by any partner of this partnership, unless the case has been disposed of by settlement prior thereto, the Court will dismiss this case and enter a decision in accordance with the amount determined by respondent.

/s/

Carleton D. Powell
Special Trial Judge

Dated: Washington, D.C.
June 29, 1994

NAME OF PARTNERSHIP
CINEMA '84

NAME AND ADDRESS OF EACH PARTNER OR SHAREHOLDER

Stanley Abel
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NOTICE TO PARTNERS

This case is one of a number of partnership cases involving motion picture films in which the general partners were Richard M. and/r A. Frederick Greenberg (the Greenbergs). Initially, the Greenbergs were the tax matters partners for the partnerships. In January 1994, involuntary petitions in bankruptcy were filed against the Greenbergs and they thereupon became disqualified to serve as tax matters partners of the partnerships. No tax matters partners have been elected or appointed in place of the Greenbergs. The Court recognizes that there may be some "indirect" partners as defined by section 6231(a)(10), I.R.C., who may not have been informed of the status of these proceedings. Nonetheless, there still may be substantial tax liabilities resulting from these proceedings for all direct and indirect partners.

Under the circumstances and after extensive conferences with Barbara T. Kaplan, Esq., of Baker & McKenzie, 805 Third Avenue, New York, New York 10022, telephone number (212) 891-3563, and George J. Noumair, Esq., of Whitman & Ransom, 200 Park Avenue, New York, New York 10166, telephone number (212) 351-3266, counsel representing certain of the petitioning partnerships, and Joseph F. Long, Esq., counsel for respondent, the Court requires that all partners (or their duly authorized representative) be present at the hearing set in the attached order unless a basis of settlement has been reached by September 15, 1994.

Any non-settling partner who does not appear in person or by a duly authorized representative will be deemed by the Court to have waived any rights under the Internal Revenue Code or the Tax Court Rules of Practice and Procedure to the appointment of a tax matters partner and to further notice of proceedings in this case. If there is no appearance by any partner of a partnership, that case will

be dismissed. Tax matters partners are reminded of their obligations under section 6223(g), I.R.C.

Many of the partners in the partnerships reside in areas outside of New York City, with many as far away as California and other locales. The Court is aware, therefore, that some partners will be required to travel. The distance of travel will not excuse the failure to attend this pretrial hearing.

Counsel for respondent has advised the Court that he has developed a settlement position with regard to this case that he is willing to offer to any partner requesting that settlement before the hearing on September 22, 1994. If a partner has any questions concerning that settlement, you or your representative should immediately contact Maurice S. Stein, Internal Revenue Service Appeals Office, P.O. Box 2954, Church Street Station, New York, New York 10008, telephone number (212) 264-7616, fax number (212) 264-9758, or Joseph F. Long, Esq., Internal Revenue Service, Office of District Counsel, Suite 220, Commerce Center One, 333 East River Drive, East Hartford, Connecticut 06108, telephone number (203) 240-3000, fax number (203) 240-3408.

United States Tax Court
Washington, D.C. 20217

CINEMA '84, RICHARD M. GREENBERG, TAX MATTERS PARTNER,	§	
Petitioner	§	Docket No. 621-92.
v.	§	GREENBERG BROTHERS
COMMISSIONER OF INTERNAL REVENUE,	§	
Respondent	§	

ORDER

This case is one of a number of partnership cases involving the acquisition and distribution of motion picture films. The years before the Court are 1984 through 1989.

A pretrial hearing was held on September 21 and 22, 1994, in New York, New York. During that hearing no partners advised the Court that they desired to be appointed a tax matters partner at that time or to litigate the issues put before the Court by the Notice of Final Partnership Administrative Adjustment. The Court determined at that hearing that it would reset this case for further hearing on these matters because it appeared the case might by resolved without litigation. The Court must now determine which, if any partners desire to actively participate in this litigation as participating partners, or to be appointed a tax matters partner so that this case may proceed to trial.

This is the partners last chance to advise the Court of their desire to participate in this litigation of this case. The failure of any partner to appear who has not settled will constitute a waiver of the right to prosecute this case as to the non-appearing partner, and may result in the dismissal of this case for failure to properly prosecute and entry of

decision in favor of respondent for the adjustments set forth in the Notice of Final Partnership Administrative Adjustment. Accordingly, it is

ORDERED that this case is calendared for a pretrial hearing at the Special Session of the Court commencing at 10:00 a.m. on February 8, 1995, in Courtroom 206, Jacob K. Javits Federal Building, 26 Federal Plaza, New York, New York 10278. It is further

ORDERED that each partner who desires to participate in this proceeding shall file with the Court by January 17, 1995, a Motion for Leave to File Notice of Election to Participate Out of Time and a Notice of Election to Participate. It is further

ORDERED that, in addition to the usual service of this order, the Clerk of the Court shall serve a copy of this order with attached notice to the partners in the partnership whose names and addresses are shown in the attached list. It is further

ORDERED that, unless a partner has entered into a settlement agreement with respondent, each partner is required to appear in person, or by a duly authorized representative with authority to order for trial, other procedural issues, and to commit that partner to serve as tax matters partner for purposes of this proceeding until the conclusion thereof if this Court so appoints him. It is further

ORDERED that, if a settlement has been reached, a report by respondent so notifying the Court of the names of the settling partners shall be submitted no later than the call of the calendar. It is further

ORDERED that if there is no appearance at this pretrial hearing by any partner of this partnership, unless the case has been disposed of by settlement prior thereto, the Court

will dismiss this case and enter a decision in accordance with the amount determined by respondent. It is further

ORDERED that, unless the case has been disposed of by settlement, if a tax matters partner is not identified and selected by the close of the pretrial hearing, the Court will dismiss this case and enter a decision in accordance with the amount determined by respondent.

/s/

Carleton D. Powell
Special Trial Judge

Dated: Washington, D.C.
December 21, 1994

NOTICE TO PARTNERS

This case is one of a number of partnership cases involving motion picture films in which the general partners were Richard M. and/or A. Frederick Greenberg (the Greenbergs). Initially, the Greenbergs were the tax matters partners for the partnerships. In January 1994, involuntary petitions in bankruptcy were filed against the Greenbergs and they thereupon became disqualified to serve as tax matters partners of the partnerships. No tax matters partners have been elected or appointed in place of the Greenbergs. The Court recognizes that there may be some "indirect" partners as defined by section 6231(a)(10), I.R.C., who may not have been informed of the status of these proceedings. Nonetheless, there still may be substantial tax liabilities resulting form these proceedings for all direct and indirect partners.

This Court previously sent notice to the partners concerning pretrial hearings held in New York, New York, on September 21 and 22, 1994. Following that hearing and after extensive conferences with Barbara T. Kaplan, Esq., of Baker & McKenzie, 805 Third Avenue, New York, New York 10022, telephone number (212) 891-3563, George J. Noumair, Esq., of Whitman, Breed, Abbott & Morgan, 200 Park Avenue, New York, New York 10166, telephone number (212) 351-3266, Thomas E. Redding, Esq. of Redding & Associates, P.C., 515 Post Oak Blvd., Suite 500, Houston, Texas 77027, telephone number (713) 965-9244, and Joseph F. Long, Esq., counsel for respondent, the Court requires that all partners (or their duly authorized representative) be present at the hearing set in the attached order in New York, New York, unless a basis of settlement has been reached by the call of the calendar on February 8, 1995.

Any non-settling partner who does not appear in person or by a duly authorized representative will be deemed by

the Court to have waived any rights under the Internal Revenue Code or the Tax Court Rules of Practice and Procedure to the appointment of a tax matters partner and to further notice of proceedings in this case. Failure to appear will constitute a waiver of the right to prosecute this case and will result in dismissal of the case. Prospective tax matters partners are reminded of their obligations under section 6223(g), I.R.C.

Many of the partners in the partnerships reside in areas outside of New York City. The Court is aware, therefore, that some partners will be required to travel. The distance of travel will not excuse the failure to attend this pretrial hearing.

Counsel for respondent has advised the Court that he has developed a settlement position with regard to this case. Counsel for respondent has further advised the Court that he has sent a settlement package which contains a closing agreement which sets forth the settlement position to all the partners he has been able to identify, who are effected by the outcome of this proceeding. If after reviewing the closing agreement and accompanying instructions a partner has any questions concerning the settlement, the partner or his or her representative should contact Maurice S. Stein, Internal Revenue Service Appeals Office, P.O. Box 2954, Church Street Station, New York, New York 10008, telephone number (212) 264-7616, fax number (212) 264-9758, or Joseph F. Long, Esq., Internal Revenue Service, Office of District Counsel, Commerce Center One, 333 East River Drive, Suite 200, East Hartford, Connecticut 06108, telephone number (203) 528-1563, fax number (203) 240-3408.

App. 44

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United States Tax Court
Washington, D.C. 20217

CINEMA '84, RICHARD M. GREENBERG, TAX MATTERS PARTNER,	§	
Petitioner	§	Docket No. 621-92.
v.	§	GREENBERG BROTHERS
COMMISSIONER OF INTERNAL REVENUE,	§	
Respondent	§	

ORDER

This case involves deductions claimed with respect to motion picture promotions. The Court held pre-trial conferences on September 21-22, 1994, and February 8, 1995. At those conferences, none of the partners who appeared indicated a desire to prosecute this case or other similar cases. Furthermore, there is no active tax matters partner in this case.

On or about July 10, 1995, respondent filed a Motion to Dismiss for Failure to Properly Prosecute. That motion was held in abeyance while the Court disposed of potentially dispositive motions concerning certain partners who had elected to participate. The Court has now disposed of those motions.

For cause, it is

ORDERED that this case is calendared for hearing on respondent's Motion to Dismiss for Failure to Prosecute at the Special Session of the Court scheduled to commence at 10:00 a.m. on July 6, 1999, in North Courtroom, Third Floor, United States Tax Court, 400 Second Street, N.W., Washington, D.C. 20217. IF THERE IS NO APPEARANCE BY OR ON BEHALF OF A PARTNER WHO WILL PROSECUTE THIS MATTER, THE COURT WILL

DISMISS THIS CASE FOR FAILURE TO PROPERLY PROSECUTE AND ENTER A DECISION SUSTAINING RESPONDENT'S DETERMINATION IN FULL. THIS HEARING WILL NOT BE CONTINUED FOR ANY REASON. This order constitutes official notice of the same to the parties herein. It is further

ORDERED that, in addition to the regular service of this Order, the Clerk of the Court shall serve a copy of this Order on each of the partners shown on the attached list.

/s/

Carleton D. Powell
Special Trial Judge

Dated: Washington, D.C.
February 3, 1999

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Washington, D.C. 20217

CINEMA '84, RICHARD M. GREENBERG, TAX MATTERS PARTNER,	§	
Petitioner	§	Docket No. 621-92.
v.	§	GREENBERG BROTHERS
COMMISSIONER OF INTERNAL REVENUE,	§	
Respondent	§	

ORDER OF DISMISSAL AND DECISION

This case involves deductions claimed with respect to motion picture promotions. The Court held pre-trial conferences on September 21-22, 1994, and February 8, 1995. At those conferences, none of the partners who appeared indicated a desire to prosecute this case or other similar cases. Furthermore, there is no active tax matters partner in this case.

On July 10, 1995, respondent filed a Motion to Dismiss for Failure to Properly Prosecute. That motion was held in abeyance while the Court disposed of potentially dispositive motions concerning certain partners who had elected to participate. The Court has disposed of those motions. See Greenberg Bros. Partnership #4 v. Commissioner, 111 T.C. 198 (1998); Greenberg Bros. Partnership #12 v. Commisioner, T.C. Memo. 1998-146.

This case was calendared for hearing on respondent's Motion to Dismiss for Failure to Properly Prosecute at the Special Session of the Court held on July 6, 1999. The order provided that "IF THERE IS NO APPEARANCE BY OR ON BEHALF OF A PARTNER WHO WILL PROSECUTE THIS MATTER, THE COURT WILL DISMISS THIS CASE FOR FAILURE TO PROPERLY PROSECUTE AND ENTER A

DECISION SUSTAINING RESPONDENT'S DETERMINATION IN FULL." The order was served on all the partners that were shown on respondent's records as still linked to the partnership proceeding. At the hearing the only appearance was made by counsel for the participating partners who asked the Court to delay the dismissal for 90 days. There was no appearance by any partner who desired to prosecute this case. On June 23, 2000, respondent filed a Notice of Consistent Agreement. Upon due consideration, it is

ORDERED that respondent's Motion to Dismiss for Failure to Properly Prosecute, filed July 10, 1995, is granted. It is further

ORDERED AND DECIDED that the partnership adjustments for the taxable years 1984, 1985, 1986, 1987, 1988 and 1989 are correct as determined and set forth in the Notices of Final Partnership Administrative Adjustments upon which this case is based. It is further

ORDERED that, in addition to regular service, the Clerk of the Court shall serve a copy of this Order of Dismissal and Decision on each of the partners shown on the attached list.

/s/

Thomas B. Wells
Chief Judge

Entered: SEP 12000

Cinema 84

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§6231. Definitions And Special Rules

(a) Definitions.—For purposes of this subchapter—

. . . .

(7) Tax Matters Partner.—The tax matters partner of any partnership is--

(A) the general partner designated as the tax matters partner as provided in regulations, or

(B) if there is no general partner who has been so designated, the general partner having the largest profits interest in the partnership at the close of the taxable year involved (or, where there is more than 1 such partner, the 1 of such partners whose name would appear first in an alphabetical listing).

If there is no general partner designated under subparagraph (A) and the Secretary determines that it is impracticable to apply subparagraph (B), the partner selected by the Secretary shall be treated as the tax matters partner. The Secretary shall, within 30 days of selecting a tax matters partner under the preceding sentence, notify all partners required to receive notice under section 6223(a) of the name and address of the person selected.

Treasury Regulation §301.6231(a)(7)-1

§301.6231(a)(7)-1. Designation or selection of tax matters partner.—

(a) *In general.*—A partnership may designate a partner as its tax matters partner for a specific taxable year only as provided in this section. Similarly, the designation of a partner as the tax matters partner for a specific taxable year may be terminated only as provided in this section. If a partnership does not designate a general partner as the tax matters partner for a specific taxable year, or if the designation is terminated without the partnership designating another general partner as the tax matters partner, the tax matters partner is the partner determined under this section.

(b) *Person who may be designated tax matters partner.*—

(1) *General requirement.*—A person may be designated as the tax matters partner of a partnership for a taxable year only if that person —

(i) Was a general partner in the partnership at some time during the taxable year for which the designation is made; or

(ii) Is a general partner in the partnership as of the time the designation is made.

. . . .

(m) *Tax matters partner where no partnership designation made.*—

(1) *In general.*—The tax matters partner for a partnership taxable year shall be determined under this paragraph (m) if —

(i) The partnership has not designated a tax matters partner under this section for that taxable year; or

(ii) The partnership has designated a tax matters partner under this section for that taxable year, that designation has been terminated under paragraph (l)(1) of this section, and the partnership has not made a subsequent designation under this section for that taxable year.

(2) *General partner having the largest profits interest is the tax matters partner.*—The tax matters partner for any partnership taxable year to which this paragraph (m) applies is the general partner having the largest profits interest in the partnership at the close of that taxable year (or where there is more than one such partner, the one of such partners whose name would appear first in an alphabetical listing). For purposes of this paragraph (m)(2), all limited partnership interests held by a general partner shall be included in determining that general partner's profits interest in the partnership. For purposes of this paragraph (m)(2), the general partner with the largest profits interest is determined based on the year-end profits interests reported on the Schedules K-1 filed with the partnership income tax return for the taxable year for which the determination is being made.

. . . .

(n) *Selection of tax matters partner by Commissioner when impracticable to apply the largest-profits-interest rule.*—If the partnership has not designated a tax matters partner under this section for the taxable year and it is impracticable (as determined under paragraph (o) of this section) to apply the largest-profits-interest rule of paragraph (m)(2) of this section, the Commissioner will select a tax matters partner as described in paragraph (p) of this section.

(o) *Impracticability of largest-profits-interest rule*—It is impracticable to apply the largest-profits-interest rule of

paragraph (m)(2) of this section if, on the date the rule is applied, any one of the following three conditions is met:

(1) *General partner with the largest profits interest is not apparent.*—The general partner with the largest profits interest is not apparent from the Schedules K-1 and is not otherwise readily determinable.

(2) *Each general partner is deemed to have no profits interest in the partnership.*—Each general partner is deemed to have no profits interest in the partnership under paragraph (m)(3) of this section (concerning termination of a designation under the largest-profits-interest rule) because of the occurrence of one or more of the events described in paragraphs (l)(1)(i) through (iv) of this section (involving death, adjudication of incompetency, liquidation, and conversion of partnership items to nonpartnership items).

(3) *General partner with the largest profits interest is disqualified.*—The general partner with the largest profits interest determined under paragraph (m)(2) of this section--

(i) Has been notified of suspension from practice before the Internal Revenue Service;

(ii) Is incarcerated;

(iii) Is residing outside the United States, its possessions, or territories; or

(iv) Cannot be located or cannot perform the functions of a tax matters partner for any reason, except that lack of cooperation with the Internal Revenue Service by the general partner with the largest profits interest is not a basis for finding that the partner cannot perform the functions of a tax matters partner.

(p) *Commissioner's selection of the tax matters partner.*—

(1) *When the general partner with the largest profits interest is not apparent* .—If it is impracticable under paragraph (o)(1) of this section to apply the largest-profits-interest rule of paragraph (m)(2) of this section, the Commissioner will select (in accordance with the notification procedures set forth in paragraph (r) of this section) as the tax matters partner any person who was a general partner at any time during the taxable year under examination.

(2) *When each general partner is deemed to have no profits interest in the partnership.*—If it is impracticable under paragraph (o)(2) of this section to apply the largest-profits-interest rule of paragraph (m)(2) of this section, the Commissioner will select a partner (including a general or limited partner) as the tax matters partner in accordance with the criteria set forth in paragraph (q) of this section. The Commissioner will notify, within 30 days of the selection, the partner selected, the partnership, and all partners required to receive notice under section 6223(a) of the selection of the tax matters partner, effective as of the date specified in the notice.

(3) *When the general partner with the largest profits interest is disqualified.*—

(i) *In general.*—Except as otherwise provided in paragraph (p)(3)(ii) of this section, if it is impracticable under paragraph (o)(3) of this section to apply the largest-profits-interest rule of paragraph (m)(2) of this section, the Commissioner will treat each general partner who fits the criteria contained in paragraph (o)(3) of this section as having no profits interest in the partnership for the taxable year and will select (in accordance with the notification procedures set forth in paragraph (r) of this section) a tax matters partner from the remaining persons who were general partners at any time during the taxable year.

(ii) *Partner selected if no general partner may be selected.*—If all general partners during the taxable year either are treated as having no profits interest in the partnership for the taxable year under paragraph (m)(3) of this section (concerning termination of a designation under the largest-profits-interest rule) or are described in paragraph (o)(3) of this section (general partner with the largest profits interest is disqualified), the Commissioner will select a partner (including a general or limited partner) as the tax matters partner in accordance with the criteria set forth in paragraph (q) of this section. The Commissioner will notify both the partner selected and the partnership of the selection, effective as of the date specified in the notice.

(q) *Criteria for selecting a partner as tax matters partner.*—

(1) *In general.*—The Commissioner will select a partner as the tax matters partner under paragraph (p)(2) or (3)(ii) of this section only if the partner was a partner in the partnership at the close of the taxable year under examination.

(2) *Criteria to be considered.*—The Commissioner may consider the following criteria in selecting a partner as the tax matters partner:

(i) The general knowledge of the partner in tax matters and the administrative operation of the partnership.

(ii) The partner's access to the books and records of the partnership.

(iii) The profits interest held by the partner.

(iv) The views of the partners having a majority interest in the partnership regarding the selection.

(v) Whether the partner is a partner of the partnership at the time the tax-matters-partner selection is made.

(vi) Whether the partner is a United States person (within the meaning of section 7701(a)(30)).

(3) *Limited restriction on subsequent designation of a tax matters partner by the partnership.*—For purposes of paragraphs (p)(2) and (3)(ii) of this section, the partnership cannot designate a partner who is not a general partner to serve as tax matters partner in lieu of a partner selected by the Commissioner.

Tax Court Rule 250. Appointment and Removal of the Tax Matters Partner

(a) Appointment of Tax Matters Partner. If, at the time of commencement of a partnership action by a partner other than the tax matters partner, the tax matters partner is not identified in the petition, then the Court will take such action as may be necessary to establish the identity of the tax matters partner or to effect the appointment of a tax matters partner.

(b) Removal of Tax Matters Partner. After notice and opportunity to be heard, (1) the Court may for cause remove a partner as the tax matters partner and (2) if the tax matters partner is removed by the court, or if a partner's status as the tax matters partner is terminated for reason other than removal by the court, then the Court may appoint another partner as the tax matters partner if the partnership fails to designate a successor tax matters partner within such period as the Court may direct.